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# In the Supreme Court
OF THE
# United States

Supreme Court, U. S.
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OCTOBER TERM, 1949

No. 155

THOMAS H. BRODHEAD, doing business as T. H. Brodhead Co.,
*Petitioner,*

vs.

WILLIAM BORTHWICK, Tax Commissioner and Tax Collector of the Territory of Hawaii,
*Respondent,*

**PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals, for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.**

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*Respondent,*

**PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.**

*To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Your petitioner respectfully shows:

**A. SUMMARY STATEMENT OF MATTER INVOLVED.**

This is a suit to recover Territorial taxes paid under protest, for the privilege of doing business with the United States, its agencies and instrumentalities.

The General Excise Tax Law of the Territory of Hawaii imposes a tax upon all persons engaged in the business of selling tangible personal property. The tax, during the period in question, was at the rate of 1½% of the gross proceeds of sales of the business, but, in the case of sales to "licensed" retail merchants for purposes of resale, the tax was at the rate of ¼ of 1% of the gross proceeds of sale. (Act 141, Session Laws of Hawaii, 1935, as amended.)

From the time of the said General Excise Tax Law in 1935 until after December 31, 1941, the Territory did not attempt to collect any taxes under said Act with respect to sales of tangible personal property to the United States, its agencies or instrumentalities. (Record, pp. 152-3, 155.) Sales to post exchanges and ships' service stores[1] were sought to be taxed at the rate of ¼ of 1% during this period on the theory, conceded to be erroneous, that they were not agencies or instrumentalities of the United States. (Record, pp. 155-6.)

Commencing as of January 1, 1942, without statutory change, the Territory proposed to collect a tax on sales to the United States (Record, p. 156) and to increase 600% the tax on sales to post exchanges from

[1]Wherever "post exchanges" is used herein, it is meant to include ships' service stores in accordance with the stipulation of the parties hereto. (Record, p. 25.)

¼ of 1% to 1½% (Record, pp. 156-7) on the administrative theory that such sales were not to retail merchants, though they were made for purposes of resale, and that post exchanges were not "licensed retailers" under the law. The reason such stores were not "licensed" was that having been determined to be government agencies,[2] they could not be required to obtain licenses from the Territory to carry on their business. (Record, pp. 24-25.)

Petitioner paid the tax in question under protest, contending, among other things, that (1) the imposition of a tax upon the gross proceeds of sales to the United States is in violation of the Organic Act of the Territory of Hawaii and the Constitution of the United States, and (2) that proceeds of sales to post exchanges cannot be discriminatorily taxed at a higher rate than sales to other retail merchants for the purpose of resale. (Record, pp. 12-14, 22.)

The Supreme Court of the Territory of Hawaii held that a tax upon the gross proceeds of sales to the United States was not in violation of the Organic Act of the Constitution of the United States. The majority of said court also held that a tax at a higher rate upon the proceeds of sales to post exchanges than on other retail merchants for the purpose of resale was not discriminatory. (Record, p. 273.)

Upon appeal, the United States Court of Appeals affirmed the judgment of the Supreme Court of the

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[2]*Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 86 L. ed. 1611 (1942).

Territory of Hawaii, holding, finally, that the construction placed upon the Hawaiian tax statute by the majority of opinion of the Supreme Court of the Territory of Hawaii is not manifestly erroneous and, consequently, such construction must be and is accepted by the United States Court of Appeals as correct. (Record, p. 280.)

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### B. THIS COURT HAS JURISDICTION.

The Federal Constitutional questions are properly preserved in the record.

This case presents constitutional issues as to the power of a territory to impose a tax with respect to sales to the United States, its agencies or instrumentalities. While it is true that this Court has limited the extent of the immunity from state taxation of various activities of the federal government, this Court, in so doing, has set forth the requirement in all cases that the tax on account of such sales be nondiscriminatory.[3]

The Court of Appeals, in holding the tax nondiscriminatory did so on the basis of the lower court construction, but overlooked the practical consideration of the matter which the claim of discrimination presents. This practical problem becomes clear when

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[3] *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L. ed. 155 (1937);
*Alabama v. King & Boozer*, 314 U.S. 1, 86 L. ed. 3 (1941);
*Penn Dairies v. Milk Control Com.*, 318 U.S. 261, 87 L. ed. 748 (1943).

presented in the form of a question, namely: If the rate of tax on a vendor is six times as great if he sells tangible personal property to a post exchange for resale than if he sells to another retailer for resale, who is he more likely to sell the goods to, particularly during a period of war-time shortages? The answer appears to be obvious. The discrimination complained of can and does exist by reason of the creation of a condition under which post exchanges encountered difficulties in obtaining merchandise because the seller must pay a higher tax on account of sales to them than on account of sales to other retail merchants for resale. The discrimination complained of also exists against a wholesaler, such as petitioner, the greater portion of whose sales are made to post exchanges, in favor of wholesalers whose entire business is done with other retailers.

The issue as to the validity of a state tax on account of the proceeds of sales to the United States has not been directly determined by this Court. In *Mayo v. United States,*[4] this Court characterized the case of *Alabama v. King & Boozer,*[5] *supra,* which was cited by the Court of Appeals as overruling the "Panhandle doctrine",[6] as one dealing with a tax on purchasers of a supplier of the United States, not as one dealing with a tax on sales to the United States or its agencies and instrumentalities.

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[4]319 U.S. 441, 87 L. ed. 1504 (1943).
[5]314 U.S. 1, 86 L. ed. 3 (1941).
[6]Record, p. 274.

### C. THE QUESTIONS PRESENTED.

1. Whether the Territory of Hawaii can constitutionally impose a tax on gross proceeds of sales to the United States.

2. Whether the Territory of Hawaii can constitutionally impose a tax on gross proceeds of sales to post exchanges and ships' service stores for resale at a rate six times that on sales to other retailers for resale.

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### D. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The decision of the Court of Appeals, with respect to the taxation of proceeds of sales to the United States, by holding such taxable, is a decision of a constitutional question in a way probably in conflict with or, in any event, not supported by applicable decisions of this Court.

2. The decision of the Court of Appeals, as to the discriminatory nature of the tax in its application of a higher rate on account of sales to post exchanges and ships' service stores than with respect to sales to other retailers for resale, holding the same to be nondiscriminatory, is a decision of a constitutional question contrary to the realities of the case, in conflict with the applicable decisions of this Court, and involving a serious question of the relationship of the federal government to the territories.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals

for the Ninth Circuit commanding that court to certify and send to this Court a full and complete transcript of the record and of the proceedings of that court had in the case numbered and entitled on its docket as "No. 11,688, Thomas H. Brodhead, doing business as T. H. Brodhead Co., Appellant, vs. William Borthwick, Tax Commissioner and Tax Collector of the Territory of Hawaii, Appellee;" and that the judgment of said court be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated, Honolulu, T. H.,
June 20, 1949.

Respectfully submitted,

THOMAS H. BRODHEAD, doing business as T. H. Brodhead Co.,

By JULIUS RUSSELL CADES,
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*Respondent,*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### OPINIONS OF COURTS BELOW.

1. The opinion of the Court of Appeals for the Ninth Circuit (Record, p. 272) is reported in 174 F. 2d 21.

2. The opinion of the Supreme Court of the Territory of Hawaii (Record, p. 191) is reported in 37 Haw. 314.

3. The decisions of the Supreme Court of Hawaii on Petition for Rehearing (Record, p. 246), and on Writ of Error After Retrial (Record, p. 186), are reported at 37 Haw. 351 and 37 Haw. 475, respectively.

4. The decision and judgment of the Circuit Court of the First Judicial Circuit, Territory of Hawaii (Record, pp. 98 and 107, respectively), are not reported.

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## II.

### JURISDICTION.

1. The judgment of the Court of Appeals was entered April 11, 1949. (Record, p. 280.)

2. Jurisdiction of this Court is invoked under Judicial Code, § 240, as amended. (28 U.S.C.A., § 347(a).)

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## III.

### STATEMENT OF FACTS.

A statement of facts has been given in the petition and, for that reason, is not repeated here.

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## IV.

### SPECIFICATION OF ERRORS.

The Court of Appeals for the Ninth Circuit erred:

1. In holding that the General Excise Tax Law, imposing a tax on the gross proceeds of sales to the

United States and its agencies and instrumentalities, does not violate the Constitution of the United States.

2. In holding that a tax on sales to post exchanges at a higher rate than on sales to other retailers for resale is not a discriminatory tax in violation of the Constitution of the United States.

3. In holding that the classification, made by the Legislature of the Territory of Hawaii between sales to post exchanges and "licensed retailers", is non-discriminatory and reasonable and not in violation of the Constitution of the United States.

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## V.

### ARGUMENT.

**FIRST: THE TERRITORY OF HAWAII CANNOT LAWFULLY IMPOSE A TAX ON THE GROSS RECEIPTS FROM SALES TO THE UNITED STATES OR ITS AGENCIES OR INSTRUMENTALITIES.**

The right of the Territory to tax the gross receipts from sales to the United States and to its agencies and instrumentalities is upheld by the Court of Appeals on the ground that this Court had overruled the ban previously promulgated by the *Panhandle*[1] case (Record, pp. 273-4); that with respect to taxation of instrumentalities of the United States, the power con-

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[1] *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 72 L. ed. 857. See *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L. ed. 155 (1937); *Alabama v. King & Boozer*, 314 U.S. 1, 86 L. ed. 3 (1941); *Curry v. United States*, 314 U.S. 14, 86 L. ed. 9 (1941); *Penn Dairies v. Milk Control Com.*, 318 U.S. 261, 87 L. ed. 748 (1943).

ferred by the Organic Act is as great as and no greater than the powers of the states with respect to such taxation (Record, p. 274); that the only question would then be as to the construction of the tax act itself (Record, p. 274); and that the construction placed upon the Hawaiian statute, unless manifestly erroneous, must be accepted as correct[2] (Record p. 275).

It is petitioner's contention that this Court has not directly held that sales to the United States can be taxed by states. The cases cited by the Court of Appeals do not seem to petitioner to be determinative of the issue. In *James v. Dravo Contracting Co.*,[3] this Court said that the *Panhandle* case[4] and *Graves v. Texas Co.*[5] can be distinguished and must be limited to their facts, and, in *Alabama v. King & Boozer*[6] this Court founded its holding on the fact that the purchaser was not the United States or its agency or instrumentality. This Court has held that the *Panhandle* line of cases[4] were overruled in so far as they hold that a tax, the economic burden of which falls on the government, may not constitutionally be imposed by a state. The transaction on account of which the tax was imposed in *Alabama v. King &*

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[2] *Waialua Agricultural Co. v. Christian*, 305 U.S. 91, 83 L. ed. 60 (1938).

[3] 302 U.S. 134, 82 L. ed 155 (1937).

[4] *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 72 L. ed. 857 (1928); *Graves v. Texas Co.*, 298 U.S. 393, 80 L. ed. 1236 (1936); *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 75 L. ed. 1277 (1937).

[5] *Graves v. Texas Co., supra.*

[6] 314 U.S. 1, 86 L. ed. 3 (1941).

*Boozer*[6] was between a seller of lumber and a purchaser who was a cost-plus contractor with the United States, but not an agency or instrumentality of the United States. It would seem that because of the vital importance of the question—whether the contractor was or was not an agency or instrumentality of the United States—this Court there recognized that if the tax were on a sale to the government or to a government agency or instrumentality directly, the tax would not have been valid under the holdings of the *Panhandle* line of cases.[4] *Curry v. United States*[7] likewise did not determine that sales to the United States are subject to tax. In that case there was involved a use tax on materials purchased by a cost-plus contractor and appropriated to its contract with the government. This Court pointed out that the contractor was not an agent or instrumentality of the government, and that, again, the government was only affected as the economic burden was shifted to it through the operation of a contract. In the case of cost-plus contractors involved in the *King & Boozer*[8] and *Curry*[9] cases, it is the purchase and use of materials by the contractor who is not an agency or instrumentality of the United States that is the subject matter of the tax.

In the *Panhandle* line of cases, as in the present case, it is the acquisition of property by the government, in effect, that was taxed. *Penn Dairies v. Milk*

[7]314 U.S. 14, 86 L. ed. 9 (1941).
[8]*Alabama v. King & Boozer*, 314 U.S. 1, 86 L. ed. 3 (1941).
[9]*Curry v. United States*, 314 U.S. 14, 86 L. ed. 9 (1941).

*Control Com.*[10] involves the validity of minimum price regulations of the state as applied to the sale of milk by a dealer to the United States. This Court held that this amounts to no greater impairment of a federal right than a tax on sales to contractors with the United States. Petitioner believes that the statement in that case with regard to federal regulations of the War Department, which rest on the reasoning of the *Panhandle Oil*[11] and like cases, which were overruled in *Alabama v. King & Boozer,*[8] refers to the reasoning of those cases that a tax is invalid merely because its burden may be shifted to the United States. A reference back to the *King & Boozer*[8] case will show that this appears to be what this Court meant. There it was said that the asserted right of one (referring to the Federal and State Governments as separate sovereign powers within the same territorial jurisdiction) to be free of taxation by the court, does not spell immunity from paying the additional costs attributable to the taxation of those who furnish supplies to the government and who have been granted no tax immunity, and that so far as a different view has prevailed, as in the *Panhandle*[12] and *Graves*[13] cases, this Court thought it no longer tenable.

In later cases, this Court has made statements showing, in petitioner's opinion, that in each case it recog-

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[10]318 U.S. 261, 87 L. ed. 748 (1943).

[11]*Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218, 72 L. ed. 857 (1928).

[12]*Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218, 72 L. ed. 857 (1928).

[13]*Graves v. Texas Co.,* 298 U.S. 393, 80 L. ed. 1236 (1936).

nized that it was dealing with a transaction different than that subjected to tax in the *Panhandle* line of cases.

In *Mayo v. United States,*[14] this Court, in invalidating a tax on activities of the United States, said that they were not dealing, as in *Graves v. New York,*[15] with a tax on the salary of an employee of the government, or, as in the *King & Boozer*[16] case, with a tax on purchases of a supplier of the United States, or, as in the *Penn Dairies*[17] case, with price control of a contractor with the United States.

In *United States v. County of Allegheny,*[18] this Court characterized the *Dravo*[19] case as concerned with a tax on the benefits of a contractor from dealings with the United States; the *Graves*[15] case as a tax on salaries from it, and said of the *King & Boozer*[20] case that the fact that materials were destined to be furnished to the government does not exempt them from a sales tax imposed on the contractor's vendors. In *United States v. County of Allegheny,*[21] an *ad valorem* tax, imposed on a lessee of the federal government, measured in part by property owned by the

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[14]319 U.S. 441, 87 L. ed. 1504 (1943).
[15]306 U.S. 466, 83 L. ed. 927 (1939).
[16]*Alabama v. King & Boozer,* 314 U.S. 1, 86 L. ed. 3 (1941).
[17]*Penn Dairies v. Milk Control Com.,* 318 U.S. 261, 87 L. ed. 748 (1943).
[18]322 U.S. 174, 88 L. ed. 1209 (1944).
[19]*James v. Dravo Contracting Co.,* 302 U.S. 134, 92 L. ed. 155 (1937).
[20]*Alabama v. King & Boozer,* 314 U.S. 1, 86 L. ed. 3 (1941).
[21]322 U.S. 174, 88 L. ed. 1209 (1944).

government, was held invalid as an undue interference with the government's ownership of its property.

This is but slightly different from the present case, which is an attempted interference with the government's acquisition of pr[illegible]y in the performance of its governmental functions. As was said in the *Indian Motorcycle Co.*[22] case, the sale and purchase constitute a single transaction in which the purchaser is an essential part; no sale is possible without a purchaser, and any tax arising out of the transaction is a tax on the purchaser. In the *Panhandle Oil*[23] case, this Court said that the right of the United States to make purchases is derived from the Constitution. While the state may impose a charge for the privilege of carrying on trade, no tax may be laid on transaction by which the United States secures the things desired for governmental purposes.

In *McLeod v. Dillworth Co.*,[24] this Court characterized a sales tax as a tax on the freedom of purchase—a freedom which war-time restrictions served to emphasize. And, in *Freeman v. Hewitt*,[25] this Court said that a tax on the sale itself is no different than a tax on gross receipts, and that a tax on gross receipts is a direct imposition on the freedom of commercial flow of goods.

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[22] *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 75 L. ed. 1277 (1931).

[23] *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 72 L. ed. 857 (1928).

[24] *McLeod v. Dillworth Co.*, 322 U.S. 327, 88 L. ed. 1305 (1944).

[25] 329 U.S. 249, 91 L. ed. 265 (1946).

There seems to the petitioner sufficient doubt as to the power of states and territories to tax sales to the United States, which is a matter of vital importance to those dealing with the Government, to require this Court to finally determine the matter.

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**SECOND: THE TERRITORY OF HAWAII CANNOT LAWFULLY IMPOSE A TAX AT A HIGHER RATE WITH RESPECT TO SALES TO POST EXCHANGES THAN WITH RESPECT TO SALES TO OTHER RETAIL MERCHANTS FOR RESALE.**

There can be no dispute with the general principle that a state or territorial tax measured by gross proceeds of sale must be nondiscriminatory in so far as sales to the United States or any of its agencies or instrumentalities, including post exchanges, are concerned, in order to be outside the constitutional prohibition.

This Court, in cases in which state taxes imposed with regard to gross receipts from contracts with the United States have been held valid, has repeatedly stated that the tax must be nondiscriminatory in so far as the federal government is concerned, and that the burden on the government must not be greater than that on other taxpayers within the state. For example, in *James v. Dravo Contracting Co.*,[26] this Court said:

> "* * * Respondent has no constitutional right to immunity from *nondiscriminatory*[27] local taxa-

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[26]302 U.S. 134, 82 L. ed. 155 (1937).

[27]Emphasis supplied.

tion and the mere fact that the tax in question burdens respondent is no defense. * * *"

And, in *Alabama v. King & Boozer*,[28] this Court said:

"* * * So far as such a *nondiscriminatory*[29] state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. * * *"

And again, in *Penn Dairies v. Milk Control Com.*,[30] this Court said:

"* * * and the mere fact hat *nondiscriminatory*[29] taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. * * *"

These cases, in laying down the general rule that there is no implied constitution immunity of the government and its agencies from nondiscriminatory state taxation upon persons dealing with them merely because the economic burden thereof may be shifted to the government, by necessary implication must be taken to mean that there is an implied constitutional immunity from discriminatory state taxation. Any

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[28]314 U.S. 1, 86 L. ed. 3 (1941).
[29]Emphasis supplied.
[30]318 U.S. 261, 87 L. ed. 748 (1943).

discriminatory tax directly impedes, retards and burdens the constitutional exercise of the powers of the government in the performance of its functions, and is unconstitutional.

It is the contention of petitioner that, first, there is a factual discrimination against post exchanges which no amount of rationalization can disguise, and, second, that the purported classification of taxpayers under which post exchanges are differentiated from other retail merchants purchasing for resale merely because they cannot be required to procure licenses to engage in business, is an unreasonable one and is aimed directly at such federal agencies for the purpose of collecting from the sellers to post exchanges an additional amount of tax which the Territory is unable to collect on account of sales by such federal agencies.

**A. Factually, a practical discrimination exists against Post Exchanges with respect to their right of purchase.**

Under the General Excise Tax Act, as construed by the Supreme Court of the Territory of Hawaii and affirmed by the Court of Appeals, the Territory is permitted to tax a wholesaler 1½% upon sales to post exchanges for resale, whereas the sales by the same wholesaler to other retailers for resale can only be taxed at the rate of ¼ of 1%.

No matter by what devious reasoning this result is attempted to be justified, it still does happen that sales to post exchanges are taxed at six times the rate of sales to other retailers for resale, and this results admittedly because the Territory cannot compel post

exchanges to take out licenses and to pay taxes upon their sales. It is true that a number of tax-exempt organizations fall in the same class, but these are all organizations to which the Territory has itself given an exemption, either to lighten their burden for reasons of policy, or by reason of the imposition of some other form of tax in lieu of the General Excise Tax. It seems clear that in such cases, the Territory, having given a tax benefit on one hand, may take it away on the other, or may impose a tax detriment in some other form.[31] However, the tax benefit which post exchanges enjoy, in so far as the freedom of tax on their sales is concerned, is one that arises under the Constitution —not by Territorial legislative sanction—and, hence, the benefit so accruing to such federal agencies cannot be nullified by the Territory.

The tax at a higher rate on account of sales to post exchanges for resale directly interferes with the freedom of purchase of such stores, particularly during war-time when the freedom of purchase is substantially restricted by war-time shortages. This was recognized by this Court in *McLeod v. Dillworth Co.*,[32] where a sales tax was characterized as a tax on the freedom of purchase, which freedom of purchase is a freedom which war-time restrictions serves to emphasize.

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[31]The Territory may classify, in any manner it wishes within the limits of the Fifth or Fourteenth Amendments, so long as it refrains from making the sole basis for imposing higher taxes on one class of taxpayers, such taxpayers' dealings with federal instrumentalities.

[32]322 U.S. 327, 88 L. ed. 1305 (1944).

In the case of post exchanges, because of the imposition of a tax on account of their purchases at a rate six times as high as that imposed on account of purchases of any other purchaser for resale, it must be quite apparent that such federal agencies would and did encounter difficulties in purchasing what they are required to purchase in order to perform their federal functions. It is the interference with this freedom of purchase by reason of the tax at a righer rate of their purchases which constitutes a direct interference with federal functions. This is not a case of mere indirect nondiscriminatory economic burden imposed on a federal agency, but one of practical discrimination which made it more difficult for the federal agency to purchase its requirements. Petitioner does not base his claim upon the relative competitive positions of post exchanges and other retail stores. It is not a case where the burden on the ultimate consumer is to be considered—such considerations are obviously questions of where the economic burden falls. The determination by Congress that the War and Navy Departments could conduct retail stores implies a direction that such stores should not be treated taxwise in a worse manner than other retail stores. The question here presented is whether the Territory can, by imposing a higher rate of tax when a wholesaler sells to post exchanges, in effect make it more difficult for post exchanges to purchase merchandise in the Territory than for other retailers to purchase the same merchandise, and that at a time of war-time shortages when the quantity of merchandise to be purchased was restricted, and, also, at a time when because of war-time

conditions the immediacy of the needs of such federal agencies had to be considered, and were to require such stores to make their purchases on the mainland, with consequent delays of delivery, would have seriously hampered the operations of such stores.

**B. The Territory, in its purported classification of the tax, has discriminated against Post Exchanges by making their tax-exempt status, in so far as their sales are concerned, the basis of a higher tax on account of purchases by such stores.**

From the evidence, it was apparent that, as construed by the Tax Commissioner, post exchanges were originally treated as retail merchants purchasing for purposes of resale. At that time the Territory was of the opinion that it could tax the sales of post exchanges and, accordingly, imposed a tax on wholesalers selling to post exchanges at the rate of ¼ of 1%. (Record, p. 155.) When it was determined, at least to the satisfaction of the Territory, that the Territory could tax sales to the United States, it chose not to distinguish the two kinds of sales, but chose to treat all sales to the United States as subject to tax at the higher rate of 1½%, although prior to such time it had recognized sales to post exchanges as being properly taxable at the wholesale rate of ¼ of 1%. (Record, pp. 160-1.)

The only reason why purchasing post exchanges are unlicensed under the Act is because they are exempt from taxation on their resales by reason of the Constitution of the United States, and that is the only material respect in which post exchanges differ from other retailers in their activities with respect to sales made by them. The difference in character of sales,

on which the rate is based, must have a reasonable relationship to the purpose of the legislation. The fact that the post exchanges are an arm of the government does not justify any difference in taxes on account of purchases made by them.[33]

As the Excise Tax Act is presently construed, the Act must be regarded as attempting to impose indirectly through increased tax on the immediate sale that which could not be constitutionally imposed on the subsequent resale. In other words, at the time of the imposition of the tax in question, there was no difference in the character of the purchases made by post exchanges and other retailers for purposes of resale. It is only when the Territory considers their relative licensing status in relation to the taxability of their subsequent resale that any distinction can be made. Although there is an illusion of equal treatment when you consider the tax on the purchases by post exchanges and lump together the tax on the purchases by other stores with the tax upon resales, there is not equal treatment, so far as the taxpayer is concerned, at the time of the procurement of the goods by the reselling organization for resale.[34]

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[33]See *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 72 L. ed. 927 (1928); *Southern R. Co. v. Greene*, 216 U.S. 400, 54 L. ed. 536 (1910); *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421, 65 L. ed. 1029 (1921); *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 78 L. ed. 1411 (1934).

[34]The dissenting Justice of the Territorial Supreme Court expressed this view in part, as follows: "However, it is not for this court to indulge in mathematical speculations or attempt to balance differences in the ultimate overall burdens of purchasers who are substantially the same, but it should confine itself to the question at hand respecting the particular and immediate sales under consideration where there undeniably would be a marked

It is obvious that such a tax places an excessive burden upon the right of purchase of post exchanges that would not be imposed had they not been clothed with a constitutional immunity from Territorial tax, and that the fact thereof directly tends to discourage sales to post exchanges while encouraging those to other retail merchants. It justifies the holding that the Act so construed is unfair in design, favoring retail businesses which are in competition with the government retail businesses in the procurement of merchandise in the Territory for resale. Such an ununiform excise tax law is discriminatory in so far as the exercise of the right of purchase by post exchanges is concerned. As this Court states in *New York v. United States,*[35] "* * * 'discrimination' is not a code of specific but a continuous process of application * * *". Being a continuous process of application, if this Court acquiesces in the exercise by the Territory of power to fix discriminatory rates with respect to sales to post exchanges substantially heigher than with respect to those to other retail merchants, the Territory could fix one still higher and so could the states, thereby effectively expelling post exchanges from territorial and state limits, drying up at its source the

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excess of burden inflicted upon the right of purchase of post exchanges not imposed upon the comparable privilege of other retail merchants nor would it be inflicted had the purchasing post exchanges not been constitutionally exempt. Therein lies the discriminatory character of the assessment in this case, there being at the time of purchase no real or substantial difference nor reasonable or tenable distinction between the actual purchasing character, retail business, purpose and function of buying of post exchanges and those of other retail merchants." (Record pp. 227-8.)

[35]326 U.S. 572, 90 L. ed. 326 (1946).

necessary flow of merchandise and rendering post exchanges unable to purchase merchandise and to function for the purpose for which they were created.

The discrimination complained of is clearly in violation of the Constitution.

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## VI.

### CONCLUSION.

It is respectfully submitted that this is a case calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Dated, Honolulu, T. H.,
June 20, 1949,

Respectfully submitted,
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